

- Formal review of activity agreements that job seekers are required to negotiate when receiving newstart or youth allowance. At the point of exit from an approved activity there will be a process for closer monitoring of the success or otherwise of the activity. Centrelink will review what the job seeker has done, look at their personal circumstances and any obstacles to participation in the workforce, and plan follow-up activities to further improve employment prospects. *(Implementation 1 July 2002.)*
- Modification of arrangements for job seekers failing to attend job interviews. From 1 July 2002, Centrelink will not be required to immediately impose a breach penalty on job seekers who fail to attend an interview and cannot be contacted. Under the new arrangements, payments will be suspended until the job seeker contacts Centrelink to explain their reasons for non attendance, at which time a decision will be made whether a breach penalty should be imposed. In these circumstances the breach will be an administrative breach rather than an

activity test breach, attracting less harsh consequences (16% reduction in payment for 13 weeks instead of 18% for 26 weeks).

*(Implementation 1 July 2002)*

- Extension of the activities available to newstart recipients so that activity test breach penalties are waived for people participating in a program of rehabilitation under the Commonwealth Rehabilitation Service or specified vocational training in a labour market program. *(Implementation 1 July 2002.)*

#### Working Credit

- Introduction of the Working Credit measure from April 2003 (rather than 20 September 2002 as originally announced). This measure was announced as part of the Australians Working Together Package, and aims to encourage people of working age who get income support payments to take up full-time, part-time or casual work by allowing them to keep more of their payments when they first commence work. It is also intended

that there will be simpler ways for assessing employment income for working age pensioners and parents. Changes will also encourage people to take up short-term work by making it easier to get back onto payments after a job ends (for up to 12 weeks).

#### International agreements

- Four new social security agreements to be negotiated with Croatia, Norway, Slovenia and Switzerland (implementation 2004). New Agreements with Germany and the United States of America commence later in 2002.

#### Compliance

- Improved strategies for minimising fraud and incorrect payment of benefits including improved processes for updating benefit recipient information, increasing the number of Rent Assistance reviews, and automating the linking of youth allowance records with the records of parents and siblings who are also in receipt of a social security payment.

[A.T.]

## Administrative Appeals Tribunal

### **Family allowance: section 885; whether liability arose after date of repeal**

SECRETARY TO THE DFaCS and ROWE  
(No. 2002/245)

**Decided:** 12 April 2002 by S.A. Forgie.

#### Background

Rowe received family allowance in 1999 and 2000 based on estimated income for 1999/2000. Her actual income exceeded the amount estimated by more than 110% and Centrelink determined that Rowe had been overpaid family allowance and sought to recover a debt of \$1726.50 during the period 25 August 1999 and 2 May 2000.

The facts of this appeal were not in dispute, the sole issue was whether s.885 of the *Social Security Act 1991* could be used to recalculate Rowe's entitlement to payments received between 29 August 1999 to 2 May 2000.

Section 885 was repealed with effect from 1 July 2000. Centrelink raised the

debt on the basis that a liability had arisen and s.885 in conjunction with s.1223(1) gave rise to a recoverable debt.

When this case came before the SSAT, the decision was set aside. In simple terms, it found that s.1223(3) could not be used to raise a debt as, at the time that liability arose, s.885 had been repealed.

#### The law

Section 885 allowed for a recalculation of family assistance in certain circumstances:

If:

- in working out the rate of family allowance payable to a person, regard is had to the person's income for a tax year; and
- the income to which regard was had consisted of an amount estimated by the person; and
- the person's income for that tax year is more than 110% of the amount of the income on which the determination of the rate of family allowance was based:

the person's rate of family allowance is to be recalculated on the basis of that income.

Section 1223(3) and (4) then allowed for amounts to be raised as a debt as follows:

- Subject to subsection (4), if:
  - an amount (the 'received amount') has been paid to a person by way of family allowance; and
  - the person's rate of family allowance is recalculated under:
    - section 884 (amendment of assessable income); or
    - section 885 (underestimate of income); or
    - section 886 (failure to notify notifiable event); or
    - section 886A (overestimate of child maintenance expenditure); and
  - the received amount is more than the amount (the 'correct amount') of the family allowance payable to the person;

the difference between the amount and the correct amount is a debt due to the Commonwealth.

(4) If:

- a family allowance is paid to a person in a tax year; and
- apart from this subsection an amount of family allowance would become recov-

erable under subsection (3) before the end of the tax year; and

(c) the amount would be recoverable because of:

- (i) an increase in the person's income; or
- (ii) an underestimate of the person's income;

the amount is recoverable only after the end of the tax year.'

Section 885 was repealed with effect from 1 July 2000 by *A New Tax System (Family Assistance)(Consequential and Related Measures) Act (No.1) 1999*. Section 1223 (3) and (4) were also repealed from this date by *A New Tax System (Family Assistance)(Consequential and Related Measures) Act (No.2) 1999*. Although already repealed, the *Youth Allowance Consolidation Act 2000* purported to repeal these subsections from 6 July 2000 and new subsections were substituted as follows:

- (a) an amount (the received amount) has been paid to a person by way of youth allowance or family allowance; and
- (b) either of the following subparagraphs applies:
  - (i) ...
  - (ii) the person's rate of family allowance is recalculated under section 884 (amendment of assessable income), 885 (underestimate of income) or 886 (failure to notify notifiable event);
- (c) the received amount exceeds the amount (the correct amount) of the ... family allowance ... payable to the person;

the excess is a debt due to the Commonwealth.

(4) If:

- (a) ... family allowance is paid to a person in a tax year; and
- (b) an amount of ... family allowance is recoverable under subsection (3) from the person; and
- (c) apart from this subsection the amount would be recoverable before the end of the tax year;

the following paragraphs have effect:

- (d) ...
- (e) if the amount of family allowance that is recoverable because of:
  - (i) an increase in the person's income; or
  - (ii) an underestimate of the person's income;

it is recoverable only after the end of the tax year.

### Submissions

The submission put by the Department was that a liability was incurred before the repeal of s.885 and that this liability continued after its repeal.

It was argued on behalf of Rowe that no liability could arise until all investigations had been completed. It was argued that this could not occur as there was no longer a provision in the Act allowing recalculation. Consequently s.1223(3) could not create a debt as s.885 'created nothing but a potential to create a debt'.

### Analysis

The Tribunal referred to s.8 of the *Acts Interpretation Act* which states as follows:

Where an Act repeals in the whole or part a former Act, then unless the contrary intention appears the repeal shall not:

- (a) ...
- (b) ...
- (c) affect any right privilege obligation or liability acquired accrued or incurred under any Act so repealed; or
- (d) ...
- (e) affect any investigation legal proceeding or remedy in respect of any such right privilege obligation liability penalty forfeiture or punishment as aforesaid;

and any such investigation legal proceeding or remedy may be instituted continued or enforced, and such penalty forfeiture or punishment may be imposed, as if the repealing Act had not been passed.

It then turned to the key issue:

If Mrs Rowe was not subject to a liability to repay the amount overpaid to her by way of Family Allowance before the repeal of ss.885 and 1223(3), then s.8 of the *Acts Interpretation Act* will have no application.

(Reasons, para. 20)

The Tribunal considered the cases of *Ogden Industries Pty Ltd v Lucas* (1967) 116 CLR 53, *Director of Public Works v Ho Po Sang* [1961] AC 901, *Robertson v City of Nunawading* [1973] VR 819, *Esber v Commonwealth of Australia and Another* (1992) 174 CLR 430 and *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 in determining the meaning of the term 'liability'.

The Tribunal discussed whether the repealed legislation created a potential or contingent liability, or whether there was a realised liability. If the liability was realised, then the presumption was that this liability was not affected by the repeal of the legislation unless the contrary intention was shown in the repealing legislation.

So, had Mrs Rowe incurred a liability prior to the amendments on 1 July 2000?

There were two possibilities: first, that a liability only arose under s.1223 if the three criteria were met — an amount

had been paid, a recalculation under s.885 had occurred and there was a difference between the amount paid and the correct amount payable. The second possibility was that a liability arose 'each and every time that family allowance was paid to Mrs Rowe'.

The Tribunal adopted the second possibility noting that there was no suggestion that s.1223(3) was limited in its effect to dealing only with matters after 30 June 2000.

It distinguished between liability and the quantum of that liability, concluding that once a person's entitlement had been assessed and paid, a liability arose to pay the difference between the amount paid and the correct amount payable. The liability existed at that time. What was unknown was the quantum of the liability.

It was the Tribunal's view that there were facts or 'fixed reference points' available at the time that the payment was made to allow determination of the liability. The estimate was known at this time and although actual income was unknown 'it could be ascertained, even if at a later time, by reference to a fixed reference point in the form of the assessment of that income by the Commission of Taxation'. Consequently 'the facts could be ascertained and did not depend on future events to create a completed liability'.

The Tribunal also found that s.885 was expressed in terms of an obligation to recalculate, not a discretion. The Tribunal stated:

It seems to me that this obligation arose each time a payment of Family Allowance was made to a person and that payment was calculated on the basis of an estimate of income. The obligation could not be fulfilled immediately for the actual income that a person receives in a tax year would often not become apparent until after the end of that year but it remained an obligation to do so when it did. As an obligation, it was not affected by its repeal unless a contrary intention appeared (*Acts Interpretation Act*, s.8).

Recalculation under s.885 was one of the criteria to be met under s.1223(3) before a debt could be due to the Commonwealth. As the Secretary was obliged to recalculate the amount of Family Allowance under s.885, I am swayed to the view that s.1223(3) imposed a liability upon a person to repay the amount revealed by that calculation to be an overpayment of Family Allowance. That liability was imposed each time the Family Allowance was paid to him or her even though the quantum of the liability was necessarily left to be determined at a later time when the person's actual income had been determined.

(Reasons, para. 35 and 36)

The Tribunal then considered the intention of Parliament in the repealing legislation and found that by retaining a reference to s.885 in the amended s.1223(3) that this showed that Parliament had intended the obligation imposed under s.885 should continue and not be affected by its repeal.

Consequently, there was no contrary intention apparent in the legislation to suggest that the liability should not continue.

#### Formal decision

The AAT decided to set aside the decision of the SSAT and substitute a decision that Rowe was liable to pay an overpayment of Family Allowance totalling \$1726.50 for the period 25 August 1999 to 2 May 2000.

[R.P.]

[Editors Note: Refer to (2001) 4(10) SSR 114 for alternative arguments in relation to this issue.]

## Parenting payment: incorrect claim; deemed claim

SECRETARY TO THE DFaCS and  
VILORI  
(No. 2002/252)

Decided: 12 April 2002 by  
M.J. Carstairs.

#### Background

Vilori claimed family tax benefit on 27 July 2000. On 15 March 2001 Vilori contacted Centrelink and discussed parenting payment. She was advised that a claim was required which was returned on 26 March 2001. Parenting payment was paid from 15 March 2001.

Vilori requested a review of this decision which was affirmed, but later set aside by the Social Security Appeals Tribunal, which decided that the claim for parenting payment should be backdated to July 2000 based on the claim for family tax benefit and maternity allowance made at that time.

#### The law

Section 15 of the *Social Security Administration Act 1999* (the Administration Act) deals with incorrect claims. The relevant subsections state as follows:

15.(1) For the purposes of the social security law, if:

- (a) a person makes a claim for a social security payment; and

- (b) the claim is an incorrect claim; and  
(c) the person subsequently makes a claim for another social security payment for which the person is qualified; and  
(d) the Secretary is satisfied that it is reasonable that this subsection be applied;

the person is taken to have made a claim for that other social security payment on the day on which he or she made the incorrect claim.

15.(4) For the purposes of this section, a claim made by a person is an incorrect claim if:

- (a) the claim is for a pension, allowance, benefit or other payment under a law of the Commonwealth, other than this Act or the 1991 Act, or under a program administered by the Commonwealth, that is similar in character to a social security payment, other than a supplementary payment; and  
(b) when the claim was made, the person was qualified for a social security payment, other than a supplementary payment.

#### Submissions

The legal argument relied on by Vilori was that s.15(4) applied in this case as she had earlier claimed family tax benefit. While this was not a social security payment as defined, it was a claim for payment under a law of the Commonwealth 'other than this Act or the 1991 Act'. It was also argued that family tax benefit was 'similar in character to' parenting payment in that both payments were payable to people with dependent children and both were subject to means testing.

The submission of the Department was that these were not similar payments in that parenting payment is an income support payment which is paid because a person is caring for a child and is less able to work, whereas family tax benefit is a payment to assist families with the cost of raising children.

It was argued that this interpretation was supported by Centrelink policy guidelines which included family tax benefit under the heading Supplementary Benefit and Assistance for Parenting Payment Recipients. It was submitted that the level of payment for these supplementary payments was lower than income support payments.

#### Conclusion

In reaching its decision the AAT considered the similar provisions that applied prior to the Administration Act. Section 500K(3) of the *Social Security Act 1991* formerly stated as follows:

500K.(3) If:

- (a) a person makes a claim (in this subsection called the initial claim) for:

- (i) a social security or service pension or a social security benefit; or  
(ii) a pension, allowance, benefit or other payment under another Act, or under a program administered by the Commonwealth, that is similar in character to parenting payment; and

(b) on the day on which the person makes the initial claim, the person is qualified for parenting payment; and

(c) the person subsequently makes a claim for parenting payment; and

(d) the Secretary is satisfied that it is reasonable for this subsection to apply to the person;

the person's provisional commencement day is the day on which the person made the initial claim.

The AAT noted that this subsection refers to the wording 'initial claim' rather than the wording in the Administration Act of 'incorrect claim'. The Tribunal concluded that:

The absence of a clear requirement in s.15(4) for the person not to be qualified for the first payment claimed must be taken to mean that the deeming provision establishes incorrectness in the fact that the person has not applied under the 1991 Act or the Administration Act, where he or she is qualified (as required by s.15(1)(c)) on the subsequent claim made under the social security law.

(Reasons, para. 34)

The AAT found no inconsistency between s.15(1) and (4) and found that the first arm of s.15(4) was satisfied.

However, it did not believe that family tax benefit and parenting payment are payments that are similar in character. The Tribunal referred to the cases of *Calderaro v Secretary Department of Social Security* (1991) 24 ALD 556 and *Favara and Department of Social Security* (1988) 16 ALD 64. It noted that:

In Favara the Tribunal observed that throughout the Act there was a distinction between mainstream payments, those that provide income support and supplementary payments, those that assist with other needs or are one-off payments. In that case the Tribunal decided that a family payment in existence at that time (family income supplement) was not similar in character to an invalid pension.

(Reasons, para. 37)

In conclusion, the Tribunal identified many differences in the way that each of the payments was calculated. Some of these included:

- That family tax benefit and other payments such as childcare payments are payments paid to low and middle income people to help them with the cost of raising dependent children, whereas parenting payment is an income support payment.